

## REMARKS

Applicants have carefully reviewed the Application in light of the Office Action mailed on March 28, 2008. Applicants re-submit the pending claims without amendment, except as to an amendment not affecting the scope of claim 26, and respectfully request reconsideration of the present application in light of the following remarks.

Claims 1, 11-13 and 26-29 stand rejected under 35 U.S.C. 102(e) as allegedly being anticipated by Wiryaman (US Pat. No. 7,010,611; hereinafter "Wiryaman"). Claim 2, 3, 17 and 18 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Wiryaman in view of Chen et al. (US Pat. No. 5,793,976; hereinafter "Chen"). Claims 4-8, 10, 19 and 21 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Wiryaman in view of Walrand et al. (US Pat. No. 6,674,760; hereinafter "Walrand"). Claims 9 and 20 have been rejected under 35 U.S.C. 103(a) as being unpatentable over Wiryaman in view of Packer (US Pat. No. 5,802,106; hereinafter "Packer"). Claim 16 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Wiryaman in view of Le Gouriellec et al. (US Pat. No. 7,133,360; hereinafter "Le Gouriellec"). Claim 14 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Wiryaman in view of Tinsley (US Pat. No. 6,965,592; hereinafter "Tinsley"). Claims 22 and 23 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Le Gouriellec in view of Wiryaman. Claim 24 has been rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Le Gouriellec in view of Wiryaman and further in view of Packer. Lastly, Claim 25 has been rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Le Gouriellec in view of Wiryaman and further in view of Walrand.

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." (See MPEP § 2131.) In addition, the identical invention must be shown in as complete detail

as contained in the claim. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236 (Fed. Cir. 1989).

To support the obviousness rejections set forth above, the Examiner appears to allege that Wiryaman, as modified by the teachings of Le Gouriellec (and, in some instances, additional cited references), render the claimed subject matter obvious.

MPEP § 2143, Part G clearly defines the Examiner's initial burden:

To reject a claim based on this rationale, [the Examiner] must articulate the following:

- (1) a finding that there was some teaching, suggestion, or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings;
- (2) a finding that there was reasonable expectation of success; and
- (3) whatever additional findings based on the *Graham* factual inquiries may be necessary, in view of the facts of the case under consideration, to explain a conclusion of obviousness.

Furthermore, the "prior art reference (or references when combined) need not teach or suggest all the claim limitations, however, Office personnel must explain why the difference(s) between the prior art and the claimed invention would have been obvious to one of ordinary skill in the art." MPEP § 2141, section III. "[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." MPEP 2143.01, citing *KSR International Co. v. Teleflex Inc.*, 550 U.S. \_\_\_, \_\_\_, 82 USPQ2d 1385, 1396 (2007), quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)

All of the rejections set forth above are premised on the Examiner's allegation that Wiryaman teaches a system that changes the quality of service or Type of Service (TOS) assignments of packets corresponding to different network applications based on observed performance of the network applications. As to independent claims 1, 13 and 26, this allegation is inherent to the Examiner's contention that Wiryaman anticipates

the claimed subject matter. As to independent claim 22, the Examiner admits that “Le Gouriellec does not disclose monitoring the performance of selected traffic classes; and upgrading the service class applied to a first traffic class in the selected traffic classes upon detection of degradation in performance of the first traffic class.” Office Action ¶ 33. Rather, the Examiner relies on Wiryaman as allegedly disclosing this subject matter.

Wiryaman fails to anticipate independent claims 1, 13 and 26. As to claim 1, Wiryaman fails to teach or suggest “conditionally designating the packets for a selected service level supported by the computer network based on the monitored performance of the network application.” As to claim 13, Wiryaman fails to teach or suggest “conditionally marking packets associated with the network application for transfer over a second label switched path in response to a degradation in performance of the network application.” As to claim 26, Wiryaman fails to teach or suggest an apparatus that “conditionally designate[s] at least one monitored traffic class for a selected service level supported by the differentiated services network based on the monitored performance of the traffic class.”

The Examiner’s reliance on Wiryaman is unavailing as it simply does not teach changing network service levels based on the monitored performance of network applications or traffic classes. Rather, the Office Action impermissibly re-arranges various aspects of Wiryaman in a manner not contemplated by the reference teachings. For example, the Examiner relies on Col. 3, lines 38-49 of Wiryaman as teaching designating packets for a selected service level. While Wiryaman does disclose a Type of Service (ToS) engine (Col. 3, lines 38-49), it does not disclose a system that “conditionally designates” (claim 1), “conditionally marks” (claim 13), or “conditionally designate[s]” (claim 26) based on monitored performance of a network application or traffic class. Rather, Wiryaman merely teaches that the TOS engine has “the ability to change the TOS value to match with any underlying application,” (Col. 3, lines 48-49), and that “It is the responsibility of the user of the TOS engine 82 to match the TOS setting to suit his or her purposes.” (Col. 3, lines 50-52). Wiryaman is silent as to

whether a TOS value can change at all after a “user” initially sets it and, assuming it can change, on what factors a change could be based.

Indeed, the Examiner incorrectly relies on teachings of Wiryaman directed to TCP rate control and bandwidth allocation as allegedly teaching this subject matter. These allegations, however, are demonstrably false. For example, Wiryaman, at Col. 3, lines 44-49, merely teaches that a TOS engine 82 can set a TOS value for packets based on classification. The remaining teachings of Wiryaman relied on by the Examiner do not involving setting of TOS values. Wiryaman, at Col. 4, lines 8-16, teaches TCP rate shaping--a mechanism that has nothing to do with TOS fields. Further, Wiryman, at Col. 4, lines 66-67 and Col. 5, lines 1-2, merely teaches a session bandwidth process that applies a filter to classify packets as belonging to a given connection. Lastly, Wiryman, at Col. 5, lines 21-29, merely teaches the allocation of bandwidth to data flows associated with a class having a minimum bandwidth guarantee. Again, this is a matter of rate control and allocation that does not involve TOS fields as disclosed in the cited reference. Accordingly, it has been thoroughly demonstrated that Wiryaman fails to anticipate the subject matter of claims 1, 13 and 26.

Similarly, the Examiner applies the same teachings of Wiryaman set forth above to claim 22. It follows that the proposed Le Gouriellec-Wiryman combination fails to establish a prima facie case of obviousness because the proposed combination fails to disclose or suggest all claim limitations and the Examiner has not explained how the differences between the claimed subject matter and the proposed Le Gouriellec-Wiryman combination would have been obvious to one of ordinary skill in the art.

Lastly, Independent Claim 1, from which claims 2-12 depend, Independent Claim 13, from which claims 14-21 depend, Independent claim 22, from which claims 23-25 depend, and Independent claim 26, from which claims 27-29 depend, have been shown above to be patentably distinct from Wiryaman and the proposed Le Gouriellec-Wiryman combination. None of the Chen, Walrand, Packer, and Tinsley references include any additional disclosure combinable with Wiryaman or the proposed Le

Gouriellec-Wiryman combination that is additionally relevant to the subject matter of claims 1, 13, 22, and 26, discussed above. Therefore, Applicant respectfully submits that Claims 2-12, 14-21, 23-25 and 27-29 are patentably distinct from the proposed combinations of prior art cited in the office action. Further, these dependent claims recite additional limitations that when considered in the context of the claimed invention further patentably distinguish the cited references.

## CONCLUSION

In light of the foregoing, Applicants believe that all currently pending claims are presently in condition for allowance. Applicants respectfully request a timely Notice of Allowance be issued in this case.

If a telephone conference would advance prosecution of this Application, the Examiner may call Mark J. Spolyar, Attorney for Applicant, at 650-739-7511.

The Commissioner is hereby authorized to charge any fee and credit any overpayment to Deposit Account No. 02-0384 of Baker Botts LLP.

Respectfully submitted,  
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